Supreme Court, U.S.
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No. 01-1883

In The
Supreme Court of the United States

FEDERAL INSURANCE COMPANY,

Petitioner,

v.

KENNETH R. JONES, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Circuit Court may review an Order of Remand beyond its plain language to determine whether that Order was based on a lack of subject matter jurisdiction despite the fact 28 U.S.C. §1447(d) unequivocally prohibits the review of remand orders which are based on a lack of subject matter jurisdiction.

PARTIES TO THE PROCEEDINGS

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JURISDICTION

By the application of 28 U.S.C. §1447(d), neither the Sixth Circuit Court of Appeals nor the Supreme Court of the United States has jurisdiction to review an order of remand which is based upon a lack of subject matter jurisdiction.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1332(c)(1):

> For the purposes of this section and section 1441 of this title – a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business

28 U.S.C. §1447(c) and (d):

> (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment

of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF FACTS

On March 27, 1999, Kenneth R. Jones ("Mr. Jones") was injured in a motorcycle collision when Leslie Billups failed to yield the right of way at a stop sign. (Pet. App. F at p. 38a.) As a result of the collision, Mr. Jones' left leg was crushed, and he suffered two cracked ribs. (Pet. App. F at p. 38a.) Mr. Jones was forced to have his left foot, ankle, and calf amputated, resulting in substantial medical bills and expenses, tremendous pain and suffering, and lost wages and lost earning capacity. (Pet. App. F at p. 38a.)

STATEMENT OF THE CASE

Kenneth and Mary Jones (individually referred to as "Mr. Jones" and "Mrs. Jones," and collectively referred to as the "Joneses") filed a Complaint on May 30, 2001, in the Stark County, Ohio, Court of Common Pleas against Petitioner, Federal Insurance Company ("Federal"),

American Motorists Insurance Company ("American"), and Energy Insurance (Bermuda), Ltd. ("Bermuda") alleging that the Joneses were entitled to coverage under insurance policies issued by Federal, American, and Bermuda. (Pet. App. at p. 36a.) Most importantly for the issues involved in Federal's Writ, ***the tortfeasor, Leslie Billups is not a party to this action***.

Because it is important to the Court's understanding of the issues involved, the Joneses will summarize the underlying substantive law in this case. The Joneses' claims against Federal are based upon the Ohio Supreme Court's decision in *Scott-Pontzer v. Liberty Mutual Ins. Co.*, 85 Ohio St.3d 660 (Ohio 1999). At the time of Mr. Jones' collision, Ohio required that ***every*** insurer offer ***every*** insured the opportunity to accept or reject uninsured and/or underinsured motorist coverage ("UM/UIM coverage"). Ohio Revised Code §3937.18(A) (1999). If an insurer failed to offer an insured UM/UIM coverage, such coverage arose by operation of law within the terms of the policy. See generally *Gyori v. Johnston Coca-Cola Bottling Group*, 76 Ohio St.3d 565 (Ohio 1996).

In *Scott-Pontzer*, *supra*, the Ohio Supreme Court analyzed the definition of "Who Is An Insured" in two Liberty Mutual policies issued to the Superior Dairy Corporation. The policy defined an insured as "You." *Id.* at 663. The Court reasoned that the defined term "You" was ambiguous. *Id.* at 664. "You" could refer to the corporation, or it could include the corporation's employees because a corporation cannot occupy an automobile, suffer bodily injury or death, or operate a motor vehicle. *Id.* at 664. Where the term of an insurance contract is ambiguous, the term is construed against the drafter. *Id.* at 665.

Accordingly, corporate employees were deemed insureds under the policy, and, because the insurer did not offer UM/UIM coverage, such coverage arose by operation of law. *Id.* at 665. Because coverage arose by operation of law, the fact that the corporate employee was neither working for the corporation nor operating a corporate vehicle at the time of his injuries was irrelevant because of the insured's violation of Ohio law and public policy. *Id.* at 665-66.

At the time of the collision, Mr. Jones was employed by American Electric Power ("AEP"), an Ohio corporation. (Pet. App. F at p. 38a.) Federal is a UM/UIM carrier for AEP. (Pet. App. F at p. 38a.) The Joneses filed their claims ***directly*** against Federal (as well as American and Bermuda) because Federal denied the Joneses' claims for UM/UIM coverage under its AEP policy. (Pet. App. F at p. 38a.)

On July 7, 2001, Federal removed this case to the United States District Court for the Northern District of Ohio. (Pet. App. F.) Removal was alleged to be based upon diversity of citizenship between the parties. (Pet. App. F. at pp. 30a, 31a.) Federal argued that the defendants were citizens of New Jersey, Illinois, and the Bahamas and that the Joneses were citizens of Ohio. (Pet. App. F. at p. 30a.)

On October 22, 2001, Judge Daniel Polster of the United States District Court for the Northern District of Ohio, ordered Federal to show cause why this case should not be remanded to state court for lack of subject matter jurisdiction. (Pet. App. D.) After the parties briefed their respective positions to the court, Judge Polster issued an Order on November 14, 2001, remanding the case back to the Stark County, Ohio, Court of Common Pleas. (Pet. App. B.)

The basis for remand was that, pursuant to 28 U.S.C. §1332(c)(1), Federal was deemed to be a citizen of the same state as its insured. (Pet. App. B at pp. 6a, 7a.) Federal's insured is AEP which is an Ohio corporation. (Pet. App. B at pp. 6a, 7a.) As the Joneses are also citizens of Ohio, complete diversity did not exist between the parties and the court therefore lacked subject matter jurisdiction. (Pet. App. B at pp. 6a, 7a.)

Federal timely appealed to the Sixth Circuit Court of Appeals. (App. A.) On January 15, 2002, the Joneses filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction with the Sixth Circuit. (App. B.) The basis of the Motion to Dismiss was that 28 U.S.C. §1447(d) clearly prohibits the review of remand orders which are based on a lack of subject matter jurisdiction. (App. B.) The Sixth Circuit agreed, and, on March 26, 2002, the court granted the Joneses' Motion to Dismiss finding that Judge Polster remanded the case back to state court for no other reason than because the District Court lacked subject matter jurisdiction. (Pet. App. A.)

Not satisfied that the Sixth Circuit properly applied 28 U.S.C. §1447(d), Federal filed its Petition for Writ of Certiorari ("Petition for Writ").

REASONS FOR DENYING THE WRIT

Federal's arguments in support of its Petition for Writ all flow from one basic contention, i.e. that the Sixth Circuit did not ensure that the District Court's remand order was based on a lack of subject matter jurisdiction. Federal argues throughout its brief that the Sixth Circuit

simply "rubber stamped" the remand order because it contains the words "subject matter jurisdiction."

Federal argues that the Sixth Circuit refused to make "even a limited inquiry into the basis of the District Court's order of remand." (Petition for Writ at 7.) Federal then argues that such a stance "places the Sixth Circuit in conflict with decisions of the Tenth, Third, and Fourth Circuits." (Petition for Writ at 7.)

However, as is more fully set forth below, Federal attempts to manufacture a conflict where there is none by confusing the analysis of the circuit courts with the courts' results. In other words, Federal tries to convince this Court that there is a conflict among the Circuits as to how they ***analyze*** the application of 28 U.S.C. §1447(d) to remand orders. In reality, the Circuits all apply the same analysis with respect to the reviewability of remand orders. However, based upon the application of that analysis to each case's particular facts, the courts differ in their results.

Just because courts arrive at different decisions based upon different fact patterns does not mean that the analysis which is applied is in conflict. As this Court will be shown, the Sixth Circuit did nothing different than other courts which have considered the reviewability of remand orders.

I. Certiorari should not be granted because there is no conflict among the Circuit Courts as to the standard of review of a remand order which is based upon lack of subject matter jurisdiction.

The Circuits are not in conflict as to the scope of review applicable in determining whether a remand is within the 28 U.S.C. §1447(d) prohibition on review. Rather, Federal attempts to manufacture a conflict among the circuits by ignoring the Sixth Circuit's opinion and by reading into it unsubstantiated motives.

Based upon this Court's rulings in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), the Sixth Circuit made a determination that the District Court's remand order was based on a lack of subject matter jurisdiction. Therefore, in following United States Supreme Court authority, the Sixth Circuit determined that the case was immune from review under Sections 1447(c) and 1447(d).

In an effort to seek this Court's review, Federal attempts to argue that the decision of the Sixth Circuit is in conflict with decisions from the Tenth and Fourth Circuits. In support of its perceived conflict, Federal first cites to the Tenth Circuit's opinion in *Flores v. Long*, 110 F.3d 730: "The mere mention of §1447(d) or the 'magic words' of subject matter jurisdiction [] do not automatically render a remand order nonreviewable under §1447(d)." *Id.* at 732.

It then cites to the Fourth Circuit opinion in *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (1996), which stated "powerful policy considerations and persuasive decisional authority support our power – and responsibility – to look past contextually ambiguous allusions and even specific citations to §1447(c) to determine by independent review of the record the actual grounds or basis upon which the district court considered it was empowered to remand."

Based upon isolated statements from each of these cases, Federal asserts that a conflict between the circuits exists, implies that the Sixth Circuit just tersely reviewed the District Court's remand order looking for the "magic words" of §1447(d) or "subject matter jurisdiction," and alleges that the Sixth Circuit refused to review the appeal. However, it is clear from the opinion that the Sixth Circuit reviewed the District Court's order, considered Federal's arguments, and dismissed them as without merit.

In its Order dismissing Federal's appeal, the Sixth Circuit stated:

> This Court has recognized that a remand order may be reviewed if it is "based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction." [Citations omitted.] But when the issue sought to be appealed is subsumed into the jurisdictional decision, it is not independently appealable.

(Pet. App. A at p. 4a.) The Sixth Circuit further found that "the legal holding with which [Federal] takes issue was in the context of the larger jurisdictional determination." (Pet. App. A at p. 4a.) Based upon such analysis, the court then determined that remand decisions based on jurisdiction were not reviewable.

In actuality and as demonstrated above, the Sixth Circuit made a ***substantial*** inquiry into the underlying rationale of the District Court's Order of Remand. First, it recognized that an order of remand may be reviewable in certain limited circumstances. It stated that, where an order of remand is based on a reason other than the lack of subject matter jurisdiction, as required by 28 U.S.C. §1447(d), then the order is reviewable on appeal. The court then determined that the District Court's remand order was based on a lack of subject matter jurisdiction, not on the merits of a collateral issue. It applied the clear and unambiguous requirements of Section 1447(d) and properly dismissed Federal's appeal.

The Court clearly considered Federal's arguments, and it noted that, when a District Court analyzes substantive issues within the larger jurisdictional context, such that those substantive issues were "subsumed" into the issue of subject matter jurisdiction, the remand order is not reviewable.

The Joneses have argued and continue to argue that orders of remand based upon a lack of subject matter jurisdiction are not reviewable pursuant to Section 1447(d). However, in a practical sense, the Joneses realize that to a very limited extent the order or remand ***must be*** reviewed to determine whether or not it was based on a lack of subject matter jurisdiction. Federal goes to great lengths to argue in favor of that which the Sixth Circuit did when it reviewed the remand order (i.e. a review of the remand order to determine if it was based on a lack of subject matter jurisdiction). Once this review is made (as the Sixth Circuit did) and the reviewing court is satisfied that the requirements of Section 1447(d) were met (as the

Sixth Circuit did), then the order of remand is subject to no further review.

Ironically, the Tenth Circuit held in *Flores* that "the remand order was based to a fair degree upon the court's finding that it lacked subject matter jurisdiction to hear the case. Therefore, the district court remand was pursuant to §1447(c) and under §1447(d) we have no jurisdiction to review the remand order." *Flores*, *supra*, at 733.

Moreover, in *Mangold*, the Fourth Circuit, upon review of a remand order, concluded that the case was remanded for a reason ***other than*** a lack of subject matter jurisdiction. *Mangold*, *supra*, at 1451. Because the district court remanded the case because it believed it had discretion to do so (and not because of lack of subject matter jurisdiction), the Fourth Circuit held that Section 1447(d) did not prohibit review of the remand order. *Id*.

If Federal is arguing that a conflict exists among the Circuit courts and that the standard of review is substantially different, the decisions which it cites should actually conflict with that of the Sixth Circuit. Neither of these two cases, in fact, conflict with the analysis or standard of review used by the Sixth Circuit.

Federal then argues that the Sixth Circuit should have considered Federal's constitutional arguments. However, Federal cites to no conflicting opinion where a Circuit Court held that such a consideration is required under the Section 1447(d) analysis.

Federal concludes this portion of its argument by attacking the underlying analysis of District Court's remand order. However, such analysis is not sanctioned by Section 1447(d) nor is it supported by the cases to which

Federal cites in support of the supposed conflict. *Flores* and *Mangold* stand for the proposition that a Circuit Court may review a remand order for the limited purpose of ensuring that the district court based its order of remand on a lack of subject matter jurisdiction. There is no conflict between Federal's cases and the Sixth Circuit's opinion because the Sixth Circuit acted in accord with those cases. Therefore, there is no conflict regarding the standard of review employed by the circuits. Consequently, this Court's supervisory power is not necessary to rectify any alleged "disparate standards" and Certiorari should be denied.

II. Certiorari should not be granted because the District Court's decision was a routine finding that diversity of citizenship was lacking between the parties, and, consequently, 28 U.S.C. §1447(d) applied to bar Federal's appeal.

In further support of its request for certiorari, Federal argues that the Sixth Circuit's decision is also in conflict with decisions out of the Third and Fourth Circuits. Federal argues that the review of a remand order is not prohibited by 28 U.S.C. §1447(d) where the "ruling which triggered the remand order, was not the type of jurisdictional determination routinely and regularly made pursuant to §1447(c)." *Carr v. American Red Cross*, 17 F.3d 671, 682. Again, the cases to which Federal cite are distinguishable and, thus, inapplicable to the Sixth Circuit's decision. As such, there is no actual or perceived conflict among the Circuits.

Carr involves a complicated procedural background. Plaintiff sued his medical provider, Osteopathic Medical

Center, and the American Red Cross after a negligent blood transfusion. The Red Cross then removed the case to federal court under its charter which granted federal courts jurisdiction over claims against the Red Cross. However, plaintiff seemingly settled its claims against the Red Cross. The Red Cross was dismissed, and plaintiff moved to remand now that diversity jurisdiction was lacking. Osteopathic sought to challenge the dismissal of the Red Cross.

The Third Circuit first determined that "a district court cannot prevent appellate review of a final collateral order by contemporaneously remanding a case to state court." *Carr* at 675. Here, the collateral order was the order dismissing the Red Cross from the suit. The prohibition on the reviewability of remand orders under Section 1447(d) would have denied Osteopathic the opportunity to challenge the district court's dismissal of the Red Cross. As such, the Third Circuit held that "where a district court's dispositive order – whether substantive or jurisdictional – is separable from the subsequent order of remand . . . the remand order itself must also be reviewable by the Court of Appeals." *Carr* at 680.

Likewise, in *Aliota v. Graham*, 984 F.2d 1350 (3rd Cir. 1993), the district court's order of remand was based on a preceding order which was final and appealable ***and*** separate and distinct from the order of remand. In this case, Plaintiffs sued various federal employees for defamation. The U.S Attorney General certified that the employees were acting within the course and scope of their employment and substituted the United States as defendant. Following an evidentiary hearing, the district court found that the employees were not acting within the course and scope of their employment and ordered the

resubstitution of the original defendants. The district court then remanded the case for a lack of subject matter jurisdiction.

The Third Circuit reversed the district court and held that the "review of the question of resubstitution in the present case is not barred by 28 U.S.C. §1447(d) (1988). [Whether the defendants were acting within the course and scope of their employment] is separate from and logically precedes the question of remand." *Aliota* at 1353.

Finally, Federal cites to *Borneman v. United States*, 213 F.3d 819 (4th Cir. 2000) in support of a supposed conflict among the circuits. *Borneman* is similar to the *Aliota* decision. In that case, the Fourth Circuit reversed the decision of the district court to remand because the order of remand, although based on a lack of subject matter jurisdiction, "was premised on two antecedent decisions that are both judicially reviewable and appealable: (1) that the United States' scope-of-employment certification was erroneous and (2) that the United States' substitution as defendant was erroneous." *Borneman* at 825.

In the instant case, there was no collateral and/or antecedent order by the District Court. The court simply found that, based upon the application of Section 1332(c) to the facts of this case, diversity of citizenship was lacking between the parties. This is specifically what the Sixth Circuit referred to when it stated that "the legal holding with which [Federal] takes issue was in the context of the larger jurisdictional determination." (Pet. App. A at 4a.) In essence, the District Court's holding that Section 1332(c) applied was made within the context of its determination that the court lacked subject matter jurisdiction.

Accordingly, the case at hand is readily distinguishable from *Carr*, *Aliota*, and *Borneman*, *supra*. Federal's perceived conflict among the circuits is without merit and certiorari should be denied.

III. Certiorari should not be granted because the issue presented herein is whether 28 U.S.C. §1447(d) bars appellate review of remand orders and not whether the "direct action proviso" applies to suits by putative insureds against insurers seeking a determination of coverage.

Federal's third reason in support of granting its Petition for Writ is nothing more than misdirection and irrelevant analysis of issues which have no bearing on this case. Federal attempts to direct this Court's attention away from the essential issue of the case, i.e. whether 28 U.S.C. §1447(d) prohibits a review of the District Court's remand order, with its diatribe on the application of Section 1332(c), the "direct action proviso," to Ohio's *Scott-Pontzer*, *supra*, doctrine.

Amid the legislative history of the direct action proviso, the application of the statute to different types of insurance policies, and its endless line of Northern District of Ohio cases, Federal cites to no case which conflicts with the Sixth Circuit's decision to dismiss Federal's appeal in accordance with Section 1447(d). The underlying legal analysis of the District Court is completely and utterly irrelevant as to whether or not Federal is entitled to Sixth Circuit review of the Order of Remand.

Federal's appeal to the Sixth Circuit is barred by Section 1447(d) and the prohibition against the review of

remand orders which are based on a lack of subject matter jurisdiction. Yet, in this portion of Federal's brief, it seeks to skip over Congress' clear bar to review and go right to the underlying substantive issues. Federal is putting the cart before the horse, or in this case, substantive matters before procedural ones. If Federal is successful in having the Sixth Circuit's Order of Dismissal reversed, then the parties will brief the underlying substantive issues to the Sixth Circuit. Until Federal convinces this Court that the Sixth Circuit improperly dismissed Federal's appeal, the underlying substantive issues are irrelevant to this Court's application to Section 1447(d) to the facts of this case.

Assuming *arguendo* that the underlying substantive issues are relevant to this Court's determination, there can be no conflict among the circuits as to the application of Section 1332(c) to the *Scott-Pontzer* line of cases because, to the best of the Joneses' knowledge, Ohio is the only state in the country which analyzes uninsured and underinsured motorist coverage in the manner that Ohio does. Accordingly, Federal cites to no case in a circuit other than the Sixth Circuit which has applied Section 1332(c) as the federal courts in Ohio have.

Furthermore, the fact that judges within the United States District Court for the Northern District of Ohio are in conflict with each other over the application of Section 1332(c) to the *Scott-Pontzer* cases does not justify granting a writ of certiorari. The conflict will eventually be addressed by the Sixth Circuit using the properly prescribed jurisdictional procedures. In a case where a district court denies a plaintiff's motion to dismiss for lack of subject matter jurisdiction and where the plaintiff ultimately fails on the merits of his case, the matter may be appealed to

the Sixth Circuit and the lack of subject matter jurisdiction issue may be raised on appeal.

At that point, the Sixth Circuit can definitively determine whether Section 1332(c) operates to destroy diversity in *Scott-Pontzer* cases. This is the only proper jurisdictional procedure for addressing this issue unless and until this Court grants certiorari and reverses the decision of the Sixth Circuit to dismiss Federal's appeal.

Regardless, Federal's arguments with respect to the direct action proviso were not before the Sixth Circuit on Federal's appeal and should not be addressed before this Court. As such, Federal offers no conflict among the Circuits which would warrant the granting of a writ of certiorari, and the writ should be denied.

IV. Certiorari should not be granted because Federal is unreasonably requesting this Court to strike down every jurisdictional limitation which Congress has placed on parties in an action in Federal Court.

In its final, "catch-all" reason for granting its Petition for Writ, Federal argues that somehow there is a conflict among the Circuits as to whether the power of the judiciary flows from the Constitution of the United States or from Congress. In support of its poorly constructed argument, Federal cites to snippets of cases and quotes taken out of their original context.

For example, Federal cites to *Terral v. Burke Construction*, 257 U.S. 529 (1922) which deals with the issue of whether or not a state can make a foreign corporation waive its right to pursue an action in federal court against that state's residents as a condition precedent to doing

business within its borders. Interestingly, Federal also references *Bondurant v. Watson*, 103 U.S. 281 (1880) which held, in part, that as long as a suit complied with the requirements of removal, the case could be properly heard in federal court. *Id.* at 287.

Finally, Federal cites *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922), which is actually dispositive of Federal's arguments:

> Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.

Id. at 232.

Federal confuses the constitutional right to pursue a claim in federal court with the Congressional grant of jurisdiction to pursue the same claim. Provided a party meets the jurisdictional requirements set forth by Congress to maintain an action in federal court, a person's constitutional right to proceed against a citizen of another state cannot be infringed.

Taken to its logical conclusion, Federal would have this Court find unconstitutional the requirements that a claim arise under the Constitution, laws, or treaties of the United States or the requirement that there be diversity of citizenship and a particular amount in controversy. Federal seems to argue that the requirement that the amount in controversy must exceed $75,000.00 or that

there be complete diversity unconstitutionally limits a person's right to federal court. The Constitutional right to federal court has already been reconciled with the jurisdictional restrictions placed upon that right by Congress. *Kline*, *supra*.

For good measure, Federal then argues that this Court should determine whether or not rights to due process and equal protection flow from the "Constitutional presumption of local prejudice" and whether the citizenship of "totally disinterested parties may be considered in determining diversity." Simply stated, these issues have no bearing on whether Section 1447(d) bars appellate review of a remand order which was based on a lack of subject matter jurisdiction. Again, Federal attempts to blur the distinction between legitimate constitutional questions and the clear and unambiguous jurisdictional requirements set forth by Congress. The issues which Federal raises here are irrelevant to this Court's consideration of the statutory requirements of Section 1447(d). Federal merely perceives a conflict where none exists. Consequently, the Petition for Writ should be denied.

CONCLUSION

The provisions of 28 U.S.C. §1447(d) naturally contemplate that, on appeal, a circuit court must first review the order of remand to ensure that the district court did, in fact, issue the order based upon lack of subject matter jurisdiction. This is precisely what the Sixth Circuit did. It addressed Federal's arguments in its decision, reviewed the analysis of the District Court, and found that

the District Court in good faith determined that there was a lack of subject matter jurisdiction. Consequently, based upon the clear language of Section 1447(d) and congressional intent, the court determined that it was prohibited from reviewing the remand order.

Now, Federal, in an attempt to seek this Court's review, attempts to manufacture conflicts among the circuits where none exist. As evidenced by the cases which Federal cites, circuit courts perform a review of remand orders to ensure that the provisions of Section 1447(d) are met. If the circuit court is satisfied that the order of remand was issued because of a lack of subject matter jurisdiction, then the remand order is not subject to further review. Federal has cited to no case in which a circuit court acted differently.

Furthermore, the District Court did not issue an order prior to the remand order that would otherwise have been appealable in the absence of Section 1447(d). Therefore, the cases which Federal cites in support of this proposition are inapplicable. Finally, Federal's exposition on the applicability of the "direct action proviso" as well as the constitutional implications of this case are irrelevant to this court's determination as to whether the Sixth Circuit properly dismissed Federal's appeal.

In the end, Federal only hopes to convince this Court that a conflict exists. However, the Sixth Circuit's dismissal of Federal's appeal in no way conflicts with how other Circuit Courts are analyzing the applicable statutes.

As such, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH R. JONES, et. al., Plaintiffs	CASE NO. 5:01CV1616
	JUDGE DAN AARON POLSTER
vs.	**NOTICE OF APPEAL**
FEDERAL INSURANCE CO., et. al., Defendants	(Filed Dec. 11, 2001)

Notice is hereby given that Federal Insurance Company, one of Defendants in the above-named case, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Opinion and Order of the United States District Court for the Northern District of Ohio, Eastern Division, remanding the cause to state court

entered in this action on the 14th day of November, 2001. A copy of the Opinion and Order are attached hereto.

Respectfully submitted,

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KENNETH R. JONES, et. al. **Plaintiffs-Appellees,** **v.** **FEDERAL INSURANCE COMPANY** **Defendant-Appellant,** **and** **AMERICAN MOTORISTS INSURANCE COMPANY, et al.** **Defendants.**	**Case No.: 01-4323** **(On Appeal from U.S. District Court Case No. 5:01CV1616)** **APPELLEES' MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION**

Plaintiffs-Appellees, Kenneth R. Jones and Mary B. Jones ("the Joneses"), by and through counsel, hereby move this Court, pursuant to 28 U.S.C. 1447(d) for its Order dismissing Appellant, Federal Insurance Company's Appeal ("Federal"). Based on the non-reviewability of orders of remand, this Court lacks jurisdiction over this matter and Federal's appeal should be dismissed.

A. Procedural Background

The Joneses filed a Complaint on May 30, 2001, in the Stark County Court of Common Pleas against, *inter alia*, Federal alleging that the Joneses were entitled to coverage under an insurance policy issued by Federal. On July 7,

2001, Federal removed this case to the United States District Court for the Northern District of Ohio.

Removal was based upon diversity of citizenship between the parties. The defendants in the case below were citizens of New Jersey, Illinois, and the Bahamas. The Joneses are citizens of Ohio.

On October 22, 2001, Judge Polster ordered Federal to show cause why this case should not be remanded for lack of subject matter jurisdiction. After the parties briefed their respective positions to the court, Judge Polster issued an Order on November 14, 2001, remanding the case back to the Stark County Court of Common Pleas. A copy of the Order is attached hereto as **Exhibit "A."**

The basis for remand was that, pursuant to 28 U.S.C. 1332(c)(1), Federal is deemed to be a citizen of the same state as its insured. Federal's insured is American Electric Power, Inc., an Ohio corporation. As the Joneses are also citizens of Ohio, complete diversity did not exist between the parties and the court below lacked subject matter jurisdiction.

Federal now seeks review of Judge Polster's decision in the herein appeal.

B. <u>Legal Argument</u>

Under 28 U.S.C. 1447(d), an order remanding a case to the State court from which it was removed is "not reviewable on appeal or otherwise," unless the case involves a civil rights claim.

The United States Supreme Court has held that only remand orders pursuant to 28 U.S.C. 1447(c) are non-

reviewable. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). That section allows for an order of remand for defects in the removal procedure and when the District Court lacks subject matter jurisdiction. 28 U.S.C. 1447(c).

The Supreme Court has recently re-affirmed their decision in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995):

> As long as a district court's remand is based on a timely raised defect in removal procedure ***or on lack of subject-matter jurisdiction*** – the grounds for remand recognized by § 1447(c) – a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d).

Id. at 127. (Emphasis added.)

Therefore, where a court remands a case back to the state court from which it arose, the order is not reviewable by the appeals court. *Zuniga v. Blue Cross and Blue Shield of Michigan*, 52 F.3d 1395 (6th Cir. 1995). In fact, this Court has previously held that remand orders based on a lack of subject matter jurisdiction are not reviewable. See, *e.g., Godsey v. Miller*, 2001 U.S. App. LEXIS 9402 (6th Cir. 2001); *Thackeray v. Boats Express Corporation*, 1999 U.S. App. LEXIS 19808 (6th Cir. 1999); and *Anusbigian v. Trugreen/Chemlawn, Inc.*, 72 F.3d 1253 (6th Cir. 1996). Copies of the unreported opinions are attached hereto as **Exhibit "B."**

Whether Judge Polster employed the correct legal analysis in remanding this case back to Stark County is irrelevant. As this Court has previously stated:

> If a district court determines, ***rightly or wrongly***, that it lacks subject matter jurisdiction over a removed case, and for that reason remands it to the court from which it was removed, the court of appeals lacks jurisdiction to review the district court's decision.

Anusbigian, supra, at 1256. (Emphasis added.) See also *State of Ohio v. Wright*, 992 F.2d 616, 619 (6th Cir. 1993) ("It makes no difference that the District Court may be wrong in its conclusions concerning jurisdiction. . . . ")

Judge Polster's Order clearly states that diversity jurisdiction is lacking in this case. Therefore, because this case was remanded for lack of subject matter jurisdiction, the Order of remand is not reviewable. Therefore, Federal's appeal should be dismissed.

WHEREFORE, Appellees, Kenneth and Mary Jones, respectfully request that this Court dismiss Appellant, Federal Insurance Company's appeal based upon the non-reviewability of the Order of remand.

Respectfully submitted,

BLACK, MCCUSKEY, SOUERS
& ARBAUGH

By: /s/ Robert E. Soles, Jr.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent by ordinary U.S. Mail to **D. John Travis**, Esq., Gallagher, Sharp, Fulton & Norman, 1501 Euclid Avenue, Seventh Floor-Bulkey Building, Cleveland, Ohio 44115-2108; **Ronald A. Rispo**, Esq. and **Robert E. Goff, Jr.,** Esq., Weston Hurd Fallon Paisley & Howley, L.L.P., 2500 Terminal Tower, Cleveland, Ohio 44113-2241; and **David Bloomfield, Jr.**, Porter, Wright, Morris & Arthur, 41 South High St., Columbus, Ohio 43215, this 15th day of January, 2002.

/s/ Robert E. Soles, Jr.
Robert E. Soles, Jr.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH R. JONES, *et al.*,	)	**CASE NO. 5:01CV1616**
Plaintiffs,	)	
vs.	)	**Judge Dan Aaron Polster**
FEDERAL INSURANCE CO., *et al.*,	)	**MEMORANDUM OF OPINION AND ORDER**
Defendants.	)	

On May 30, 2001, Plaintiffs Kenneth R. Jones and Mary B. Jones filed a Complaint in the Stark County Court of Common Pleas against Defendants Federal Insurance Company ("Federal Insurance") and American Motorists Insurance Company. Plaintiffs' Complaint arises out of a March 27, 1999 accident which occurred when a negligent driver struck Kenneth Jones as he was riding his motorcycle. Plaintiffs allege that they are insureds under their employers' uninsured/underinsured motorist insurance policies (*see, e.g., Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*, 85 Ohio St. 3d 660 (1999)) and that the defendant insurers breached their contracts of insurance and acted in bad faith.

On July 2, 2001, Defendant Federal Insurance removed the case to this Court pursuant to 28 U.S.C. § 1332 (diversity jurisdiction). (ECF No. 1). On September 18, 2001, Plaintiffs filed an Amended Complaint (ECF No. 20) which added a third insurer, Energy Insurance (Bermuda, Ltd., to the case.

On October 19, 2001, the Court issued an opinion in *Kormanik v. St. Paul Fire and Marine Ins. Co.* (Case No. 5:01CV2122), remanding a *Scott-Pontzer* case for lack of jurisdiction. On October 22, 2001, the Court issued a Show Cause Order (ECF No. 29) which attached the *Kormanik* opinion and required Federal Insurance to explain why this case should not also be remanded. On November 1, 2001, Federal Insurance filed a response (ECF No. 32) to the Court's Show Cause Order. On November 5, 2001, Plaintiffs filed a Memorandum in Opposition (ECF No. 33) to Federal Insurance's response.

Having reviewed the parties' briefs, the Court finds that this case must be remanded for the same reasons stated in the *Kormanik* opinion. Although the defendant insurers are located in New Jersey, Illinois, and the Bahamas, at least one of the insureds, American Electric Power Co., Inc., is a citizen of Ohio. Because Plaintiffs are also citizens of Ohio, diversity jurisdiction is lacking.

For the reasons stated above, the Court hereby Orders that the above-captioned case be remanded to the Stark County Court of Common Pleas.

IT IS SO ORDERED.

S/Dan Aaron Polster 11/14/01
Dan Aaron Polster
United States District Judge

MARK THACKERAY, Plaintiff-Appellee, v.
BOATS EXPRESS CORPORATION, Defendant-Appellant.

No. 99-3530

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1999 U.S. App. LEXIS 19808

August 16, 1999, Filed

COUNSEL: For MARK THACKERAY, Plaintiff-Appellee: Michael A. Paolucci, Cincinnati, OH.

For BOATS EXPRESS CORPORATION, Defendant-Appellant: Paul H. Lamboley, Washington, DC.

JUDGES: Before: KRUPANSKY, BOGGS, and CLAY, Circuit Judges.

OPINION: ORDER

The defendant appeals the district court's order remanding this action to the state court from which it was removed. The plaintiff moves to dismiss this appeal on grounds that the order is not appealable.

The plaintiff commenced the action in an Ohio common pleas court with a complaint that asserted state law causes of action and claimed damages for the defendant's failure to timely deliver a boat as agreed. The defendant removed the action to federal district court based on 49 U.S.C. § 14706 of the Interstate Commerce Act, also referred to as the Carmack Amendment. That statute imposes liability for "actual loss or injury to the property" caused by a carrier. The defendant argued that the plaintiff's causes of action were preempted by the Carmack Amendment. The district court granted the plaintiff's motion to remand, concluding that the plaintiff's action

was not for damage to the property and that, in fact, the defendant had not delivered the property. In a subsequent order denying a motion to reconsider and in an order denying a stay pending appeal, the court noted that its remand was based upon a lack of subject matter jurisdiction.

A court may remand a case for lack of subject matter jurisdiction at any time before final judgment. 28 U.S.C. § 1447(c). The removal statute further provides, at **§ 1447(d)**, that an order remanding a case to state court is not reviewable by appeal or otherwise. That section, however, bars review only of remands for the reasons stated in § 1447(c). *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 46 L. Ed. 2d 542, 96 S. Ct. 584 (1976). Thus, **§ 1447(d)** precludes review of remand orders that are based on either a lack of subject matter jurisdiction or defects in removal procedure. *Quackenbush v. Allstate Insurance Company,* 517 U.S. 706, 712, 135 L. Ed. 2d 1, 116 S. Ct. 1712 (1996). This court has recognized a limited exception where the remand order is based on the merits of a collateral, substantive decision as opposed to an issue of jurisdiction. *Anusbigian v. Trugreen/Chemlawn,* 72 F.3d 1253 (6th Cir. 1996).

Although the defendant characterizes the district court's order as something other than a conclusion that it was without subject matter jurisdiction, the district court twice stated that it was remanding the action for lack of subject matter jurisdiction. Further, when a preemption issue is addressed that is necessarily related to the question of subject matter jurisdiction, it is not elevated to an appealable collateral issue. *See Baldridge v. Kentucky Ohio Transportation, Inc.,* 983 F.2d 1341, 1349 (6th Cir. 1993).

Therefore, the plaintiff's motion to dismiss this appeal for lack of jurisdiction is **GRANTED**.

ELMER GODSEY, Plaintiff-Appellee, v. KEN MILLER, CLYDE BOWLING, KANSAS SMITH, ASPLUNDH TREE EXPERT, INC., a corporation, and AMERICAN ELECTRIC POWER SERV. CORP., a corporation, Defendants-Appellants.

Nos. 00-5045, 00-5055

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

2001 U.S. App. LEXIS 9402; 9 Fed. Appx. 380

May 10, 2001, Filed

COUNSEL: For ELMER GODSEY, Plaintiff-Appellee (00-5045, 00-5055); Frank R. Riley, III, Whitesburg, KY.

For AMERICAN ELECTRIC POWER SERVICE CORPORATION, Defendant-Appellant (00-5045): Randall S. May, Barrett, Haynes, May, Carter & Roark, Hazard, KY.

For AMERICAN ELECTRIC POWER SERVICE CORPORATION, Defendant-Appellant (00-5045): David A. Laing, Marc L. Fleischauer, Porter, Wright, Morris & Arthur, Columbus, OH.

For KEN MILLER, CLYDE BOWLING, KANSAS SMITH, ASPLUNDH TREE EXPERT COMPANY, Defendants-Appellants (00-5055): Mark J. Hinkel, Shannon M. Naish, Landrum & Shouse, Lexington, KY.

JUDGES: Before: KRUPANSKY, BOGGS, and BATCHELDER, Circuit Judges.

OPINION: PER CURIAM. Elmer Godsey, a former employee of defendant Asplundh Tree Expert, Inc. ("Asplundh") has brought claims against all defendants alleging discrimination on the basis of age, in violation of the Kentucky Civil Rights Act, KY. REV. STAT. ANN. § 344.040

(Michie 1999), based on his termination from Asplundh. Godsey originally brought suit in state court, and defendants attempted to remove the case to federal court on the basis of diversity. Defendants Miller, Smith, and Bowling are, like Godsey, residents of Kentucky, but defendants asserted that Godsey's complaint failed to allege properly any genuine claim against these non-diverse parties, essentially claiming fraudulent joinder. The district court interpreted Godsey's complaint as alleging that the non-diverse parties were participants in a conspiracy in violation of KY. REV. STAT. ANN. § 344.280(2) (Michie 1999). Because of the consequent lack of diversity, the district court remanded the action to state court. Defendants now appeal the district court decision, which plaintiff claims is unreviewable under 28 U.S.C. § 1447(c). For the reasons that follow, we dismiss the appeal while vacating any residual effect of the district court's order.

I

Defendants Miller, Smith, and Bowling are employees of Asplundh; Asplundh was providing services under contract to defendant American Electric Power Service Corp. ("AEP") at the time of Godsey's termination. For purposes of this appeal, the parties accept Godsey's complaint as stating the facts behind this action. Godsey was a brush trimmer and employee of Asplundh, 65 years of age in 1999, when he was carrying out Asplundh's contract with AEP to clear the foliage from power lines. Defendants Miller, Bowling, and Smith are respectively, Foreman, Assistant General Foreman, and Supervisor at Asplundh. Godsey claimed that Miller had made "discriminatory inquiries" in the spring of 1999 into when Godsey was going to retire. On June 3, 1999, Miller, Bowling, and

Smith approached Godsey at his job site and told him that AEP did not want him working for them anymore. They informed Godsey he was laid off and transported him to his home in Perry County, Kentucky. This describes essentially the full content of the complaint with regard to the conduct of Miller, Bowling, and Smith (and AEP). In a later pleading (his response to AEP's motion to dismiss in federal court), Godsey stated that his complaint "inferentially alleged" that these defendants had conspired to "aid, abet, incite, compel or coerce" Asplundh to discharge Godsey, (Godsey Br. at 11), but no specific incidents of such persuasion were adduced, nor was the complaint ever amended.

Defendant Asplundh, not joined by defendant AEP, but together with Miller, Bowling, and Smith, filed a notice of removal with the federal district court. Acknowledging that Miller, Bowling, and Smith were Kentuckians, the notice claimed that they were "sham defendants which have been improperly joined as defendants in the present action for the sole purpose of defeating the jurisdiction of this Court." The notice argues that these defendants are a sham because Godsey's complaint mentioned only KY. REV. STAT. ANN. § 344.040 (Michie 1999) as statutory authority for his age discrimination complaint, a statute applicable only against employers rather than individuals. Acting separately in the federal court, defendant AEP filed a motion to dismiss on similar grounds, since AEP was also not Godsey's employer. Godsey defended removal by pointing out his complaint had alleged violations of "KRS 344.040 *et seq.*" and among the provisions "et seq." is KY. REV. STAT. ANN. 344.280(2) (Michie 1999), which allows non-employers to be held liable as part of a conspiracy to deprive a plaintiff of civil rights.

In December 1999, after receiving briefs from both side, [sic] the district court issued an order ruling on AEP's motion. The court concluded that Godsey had sufficiently alleged a conspiracy claim against AEP and "using the same rationale, Ken Miller, Clyde Bowling, and Kansas Smith can be sued under KRS 344.280(2)." In the next paragraph, the court then stated, "[t]he validity of this conspiracy cause of action ... destroys the complete diversity necessary to remove this suit under 28 U.S.C. § 1441. Therefore, the case will be remanded to the Perry Circuit Court." In making this ruling, the district court also adverted to the procedural flaw in the notice of removal, which was not signed by all defendants, as the court pointed out was required by 28 U.S.C. § 1446. However the court declined to "address the procedural error," "as this case is being remanded based on lack of diversity jurisdiction[.]"

The case was then stricken from the active docket, but the order was labeled "FINAL AND APPEALABLE." Following this suggestion, defendants have appealed it. Godsey, however, points to the language of 28 U.S.C. **§ 1447(d)**, which provides that "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ."

II

Standard of Review

If we were to find the issue reviewable, the standard of review on the district court's decision to remand would appear to be de novo. *Cf. Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.,* 176 F.3d 904, 907 (6th Cir. 1999) (reviewing a

denial of a motion to remand). The parties agree that this is the proper standard should we reach the issue.

Reviewability

The review of remand orders to state courts is barred by 28 U.S.C. § **1447(d)** when the order "falls into either category of remand order described in § 1447(c) . . . lack of subject matter jurisdiction or defects in removal procedure." *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 711, 135 L. Ed. 2d 1, 116 S. Ct. 1712 (1996). If "a district court remands a case based on the grounds listed in Section 1447(c), this Court cannot review the remand order." *Zuniga v. Blue Cross and Blue Shield of Michigan,* 52 F.3d 1395, 1400 (6th Cir. 1995) (citation and quotation omitted). This is true even if the district court's decision to remand proceeds from an erroneous basis. *Ibid.*

A limited exception, asserted by defendants, exists when the remand order is "based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction." *Regis Associates v. Rank Hotels (Management) Ltd.,* 894 F.2d 193, 194 (6th Cir. 1990). In *Regis,* this principle was used to allow review of a district court's decision to remand based on its interpretation of a contractual forum selection clause. The application of this exception, however, was found inappropriate when the district court based its remand for lack of subject-matter jurisdiction on its legal determination of the absence of federal preemption, *Baldridge v. Kentucky Ohio Transportation, Inc.,* 983 F.2d 1341, 1350 (6th Cir. 1993), or the lack of status as a federal officer. *See State of Ohio v. Wright,* 992 F.2d 616, 618-619 (6th Cir. 1993) (en banc).

On the face of Godsey's complaint, complete diversity was lacking. Therefore, in order for removal to occur, the defendants were required to show fraudulent joinder to eliminate the non-diverse parties, *see* 14B CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3723 (3d ed. 1998), and this is what they asserted, and what the district court was required to assess. "When a non-diverse party has been joined as a defendant, then in the absence of a substantial federal question the removing defendant may avoid remand only by demonstrating that the non-diverse party was fraudulently joined. Under the doctrine of fraudulent joinder, the inquiry is whether [plaintiff] had at least a colorable cause of action against [defendant] in the . . . state courts." *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.,* 176 F.3d 904, 907 (6th Cir. 1999); *see also Alexander v. Electronic Data Sys. Corp.,* 13 F.3d 940, 949 (6th Cir. 1994). In *Jerome-Duncan* we thus looked to the state law to determine whether the non-diverse defendant was a proper party or whether it was fraudulently joined, based on the legal sufficiency of the claim, and we disregarded any inquiry into plaintiff's actual motive in joinder. 176 F.3d at 907. The burden of proving fraudulent joinder is placed on the party asserting the existence of complete diversity. *See Alexander,* 13 F.3d at 949.

This case differs from *Regis* in that the issue of a forum selection clause is an independent contractual concern created by the actions of the parties, and is not linked to the inherent subject-matter jurisdiction of the court. By contrast, where review was not allowed in *Baldridge* and *Wright,* this linkage between the issue decided and jurisdiction was the fundamental reason against review: the decision of the issue asserted by

appellants to circumvent § **1447(d)** was held to have been a necessary precursor to a decision on the jurisdictional (§ 1447(c)) issue that had been before the district court. This also appears to be the case here, where the issue of fraudulent joinder and diversity – the jurisdictional question – was completely dependent on the prior determination of the adequacy of a conspiracy complaint that could reach non-diverse defendants.

In similar circumstances, where the district court interpreted Michigan law to determine if the amount in controversy was present before remanding, we have held the order to be beyond review. *See Anusbigian v. Trugreen/Chemlawn, Inc.*, 72 F.3d 1253 (6th Cir. 1996). In *Anusbigian,* the district court had been compelled to analyze whether the plaintiff could maintain an action under MICH. COMP. LAWS ANN. § 600.2961, which would have allowed his possible recovery to exceed the necessary amount in controversy; it was determined that he could not, which motivated the remand. *Id.* at 1254. In holding the order unreviewable in the face of plaintiffs's assertion of the *Regis* exception, we stated that the "fact that the district court based its jurisdictional determination on an interpretation of Michigan law is beside the point." *Id.* at 1257. We also noted that the district court's decision did not foreclose assertion of any issue for litigants; it foreclosed only "further litigation of [the] claim in federal court." *Ibid.*

We have previously held in unpublished persuasive authority that a court's decision of issues of fraudulent joinder does not amount to a substantive decision of the kind that may avoid the bar to reviewability. *See Calvert v. Xerox Corp.*, 1995 U.S. App. LEXIS 5341, No. 94-1701, 1995 WL 109000 (6th Cir. Mar. 14, 1995) (unpublished). In

Calvert, as here, defendants' attempt to remove was rejected and the federal district court remanded to state court. Defendants then asserted *Regis* as a route to reviewability of the remand order, including as one of the "substantive decision[s]" the district court's adjudication of their claims of fraudulent joinder to defeat diversity. We stated there that in "deciding whether a party has been fraudulently joined, the district court must consider whether there is a reasonable basis for predicting that the plaintiff could prevail against the non-diverse defendant. It does not appear that the district court went beyond this initial jurisdictional inquiry in ruling that the individual defendant had not been fraudulently joined." *Id.* at *2 (citation omitted) (finding remand unreviewable). Similarly, here the district court was required to assess the conspiracy claim to determine its jurisdiction; the primary reason it did so in the context of a motion to dismiss was that AEP had, quite improperly, not joined in the notice of removal which asserted essentially the same legal arguments.

It may well be that another court would find that the defendants carried their burden. *Cf. Stacy v. Shoney's Inc.,* 1998 U.S. App. LEXIS 6659, No. 97-5393, 1998 WL 165139 (6th Cir. Mar. 31, 1998) (finding fraudulent joinder in a similar suit despite explicit mention of the conspiracy statute). Unfortunately for the defendants, even a clearly erroneous decision does not provide us with a license to revisit a remand issued on the basis of a lack of subject-matter jurisdiction. *See e.g., Page v. City of Southfield,* 45 F.3d 128, 131 (6th Cir. 1995). Such orders are "beyond all power of appellate review, even if based on erroneous principles or analyses." *Ibid.*

The fact that § 1447 or "subject-matter jurisdiction" was not mentioned by the district court in its remand order does not change the analysis, if the decision was "clearly on jurisdictional grounds." *Anusbigian,* 72 F.3d at 1255; *see also Wright,* 992 F.2d at 617. Equally, the fact that the order was labeled as "appealable" does not make it appealable. *See Feidt v. Owens Corning Fiberglas Corp.,* 153 F.3d 124, 129 (3d Cir. 1998). In *Feidt,* the district court had not only certified the question for appeal, but the Third Circuit had also granted leave to appeal. Nonetheless, it was held that this could "not circumvent the jurisdictional bar of section **1447(d)**." *Id.* at 129 n.5 (finding remand order unreviewable). We hold the decision was clearly on jurisdictional grounds.

However, there remains some confusion regarding the district court's denial of defendant AEP's motion to dismiss, prior to its finding a lack of federal jurisdiction over Godsey's complaint. The district court repeated this denial in its order, stating that the "Defendant's motion . . . is hereby . . . DENIED" and only then ordering the remand in the next paragraph of the order. Although it is obvious that, without subject-matter jurisdiction, the court was without power to decide any substantive motion on the merits of the case, this sequence of analysis and orders has created unnecessary uncertainty regarding the nature and preclusive effect of the district court's ruling.

It is a well settled principle that "the district court must be certain that federal subject matter jurisdiction is proper before entertaining a motion by the defendant under Federal Rule 12 to dismiss the plaintiff's complaint for failure to state a claim upon which relief may be granted." 14C CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3739, at 423 (3d

ed. 1998). *See also Gross v. Hougland,* 712 F.2d 1034, 1036 (6th Cir. 1983) (stating "disapproval of the district court's decision to dispose of this action on the merits without first resolving the question of subject matter jurisdiction"). The preferred method is to determine whether the action has been properly removed and the court has jurisdiction before disposing of other pending motions. In the admittedly unorthodox posture of this case, this required treating AEP as the cart and the individual defendants as the horses pulling it; AEP's motion became moot as soon as the similar analysis applied to the conspiracy claims against the non-diverse parties failed to show fraudulent joinder. *See, e.g., Thompson v. Fritsch,* 966 F.Supp. 543, 545 (E.D. Mich. 1997) (refusing to address defendant's motion for summary judgment, which became moot after a finding of lack of jurisdiction).

Like the district court, we have no power under Article III to decide the merits of the case over which we have no jurisdiction. As just discussed, the district court has determined that the federal courts have no jurisdiction over this matter and we cannot revisit that determination. Nonetheless, we have the power to vacate any decision that lacked jurisdiction, a decision "which we cannot leave undisturbed." *Goldin v. Bartholow,* 166 F.3d 710, 718 (5th Cir. 1999). Our common solution in such cases is to vacate the judgment and remand with orders to dismiss, in order to clear the path for "relitigation of the issues" and prevent an unreviewable judgment from "spawning any legal consequences." *Brock v. UAW,* 889 F.2d 685, 696-97 (6th Cir. 1989) (citation and quotation omitted) (vacating and remanding with instructions to dismiss because of mootness). *See also Ford v. Hamilton Investments, Inc.,* 29 F.3d 255, 260 (6th Cir. 1994) (vacating and remanding with

instructions to dismiss district court's order issued without subject-matter jurisdiction).

III

Accordingly, we VACATE those portions of the order denying AEP's motion to dismiss, and REMAND this matter with instructions to dismiss this case (00-5045) for lack of subject-matter jurisdiction. We hold the district court's finding regarding jurisdiction and consequent order of remand to state court to be beyond review.